STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MELVIN MATTHEWS,

Defendant-Appellant.

UNPUBLISHED
November 18, 2010

No. 292508
Kalamazoo Circuit Court
LC No. 2008-001079-FC

Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for armed robbery, MCL 750.529; assault with intent to do great bodily harm, MCL 750.84; and resisting and obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of imprisonment of 30 to 50 years for the armed robbery conviction, 95 months to 30 years for the assault with intent to do great bodily harm conviction, and 25 months to 15 years for the resisting and obstructing a police officer conviction, with credit for 339 days. We affirm.

Defendant argues that the assault as well as the possession of a dangerous weapon did not occur "in the course of a larceny," but occurred before the larceny was attempted or committed. Further, defendant contends no evidence showed that the assault was committed in order to attempt to commit the larceny. Thus, defendant argues that his conviction for armed robbery should be reversed. We disagree.

We review de novo whether there was sufficient evidence to support the verdict by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). All elements of a crime including intent may be proved by reasonable inferences arising from circumstantial evidence. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001); *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). The trier of fact, not an appellate court, determines what inferences may be fairly drawn from the evidence. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

When viewed in a light most favorable to the prosecution, there was sufficient evidence from which a rational trier of fact could find the elements of the crime occurred beyond a

reasonable doubt. Specifically, that defendant committed an assault and used a dangerous weapon in the course of committing a larceny. The phrase, "in the course of committing a larceny," is defined to include "acts that occur in an attempt to commit the larceny, or during commission of the larceny . . . ." MCL 750.530(2). The evidence and reasonable inferences support that assaultive acts occurred in an attempt to commit or during the commission of the larceny. Kenneth Tolbert, the victim, saw some people in the park. As he walked, he spoke with two of them. He had no other contact or interactions with the people. As soon as he passed them, however, they viciously attacked him with a bottle and a brick.[1] Defendant participated in the vicious attack, during which Tolbert fell to the ground. On the ground, Tolbert heard someone say, "Go through his pockets." Tolbert testified that he then saw defendant reach into his pants pocket and take his cellular telephone. A rational fact-finder could reasonably infer that Tolbert was attacked by defendant or someone he was aiding and abetting in an attempt to commit larceny, and that the force or violence and the possession and use of the weapons occurred during the course of committing the larceny. MCL 750.529; MCL 750.530(2); *Plummer*, 229 Mich App at 299. Hence, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Herndon, 2*66 Mich App at 415. In reaching our conclusion, we note that there was no separation between the assault and the larceny. The statement, "Go through his pockets," which was made as the assault rendered Tolbert helpless on the ground, supports the inference that the assault was intended to facilitate larceny. The assault occurred in the course of committing or attempting to commit a larceny.

Defendant also argues that the word "attempt" was not defined in the jury instructions as requiring specific intent to steal, and it was critical that the jury understood that it could not convict unless defendant had the intent to commit a larceny when he committed the assaultive acts with the bottle. In addition, defendant continues to maintain that no evidence suggested that there was intent to commit larceny when the attack on Tolbert occurred. Thus, defendant argues that the jury was not properly instructed. We generally review claims of instructional error de novo. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). However, we will review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Neither MCL 750.529 nor MCL 750.530 defines "attempt." The ordinary meaning of that word is "to make an effort at; try; undertake." *Random House Webster's College Dictionary* (1997). However, MCL 750.92 defines an "attempt" as a separate criminal offense by providing that "[a]ny person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same . . . shall be punished as follows . . . ." The crime of attempting to commit an offense requires the specific intent to commit the

[1] Although defendant concedes that a rational trier of fact could find that a bottle is a dangerous weapon, we conclude that a rational trier of fact could also conclude that the brick was a dangerous weapon because it is an object capable of causing death or serious injury. The evidence supports the conclusion that the brick was possessed and used as a dangerous weapon. See *People v Norris*, 236 Mich App 411, 415; 600 NW2d 658 (1999).

crime attempted. *People v Thousand*, 465 Mich 149, 164 n 15; 631 NW2d 694 (2001). Here, the word "attempt" was not used to define a separate crime but to set temporal limits during which proscribed conduct must occur. In this context, we conclude that the common, ordinary meaning of the word "attempt" was susceptible to comprehension by a rational fact-finder. There is no "error warranting reversal as a result of a trial court's failure to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension." *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006). Plain error has not occurred where the instructions as a whole adequately protect defendant's rights by fairly presenting the issues to be tried. *Id.* at 337-338. Moreover, the trial court instructed the jury regarding the intent necessary to commit the underlying crime of larceny: "A larceny is the taking and movement of someone else's property or money with the . . . intent to take it away from that person permanently." Because the word "attempt" as used in MCL 750.530(2) is susceptible of ordinary comprehension and because the jury was instructed regarding the specific intent necessary to commit larceny, we conclude the instructions adequately protected defendant's rights. Based on the foregoing, defendant has not established that plain error requires reversal. *Carines*, 460 Mich at 763.

We affirm.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder